United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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74-1019

IN THE

United States Court of Appeals

For the Second Circuit

No. 74-1019

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

BERTRAM L. PODELL and MARTIN MILLER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT BERTRAM L. PODELL

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REPLY BRIEF FOR APPELLANT BERTRAM L. PODELL

I. THE SANTOBELLO ISSUE

Appellant, Bertram L. Podell, has attacked his guilty plea on the ground of the Government's failure to keep a commitment concerning sentence recommendation. In support of his position, Appellant principally relies upon the United States Supreme Court's decision in Santobello v. New York, 404 U.S. 257 (1971).

In answer to Appellant's claim, the Government argues that reliance on Santobello is "wholly misplaced". (Gov't. Br., p.17) The Government reasons that:

> "The three critical facts in Santobello are not present in this case: (1) No promise as to a position at sentence was made by the government as part of a plea bargain, much less a promise that the government would not recommend a jail sentence; (2) the representation that was made was not violated; and (3) the government's position at sentence was not a significant factor motivating the Appellants to plead guilty." (Gov't. Br., p.18)

This argument is pure sophistry. On the one hand, the Government urges that the District Court's factual conclusions are "overwhelmingly supported by the record" and should not be disturbed. (Gov't Br., p.17) Later, the Government attempts to disavow these same findings and describes them as "mystifying". (Gov't Br., p.24) The fact remains that the District Court made a factual finding that there was an "agreement" and that, at the very least, the "spirit" of the agreement had been violated. (A 180) Despite the Government's semantical odyssey, the narrow issue for this Court is whether Santobello allows a finding that a broken commitment concerning sentence recommendation may be discarded as an insignificant aspect of the plea. Since Santobello is so closely

in point, Appellant specifically relies on this case to support the proposition that such a commitment cannot be cast aside as "immaterial". 404 U.S. at p.263.

In an attempt to bolster a rather untenable position, the Government seems to suggest that Appellant must overcome an additional burden because his counsel "briefed and argued" the Lombardozzi cases before this Court. (Gov't. Br., p.22) United States v. Lombardozzi, 436 F.2d 878 (2nd Cir., 1971); United States v. Lombardozzi, 467 F.2d 160 (2nd Cir., 1972). As pointed out in Appellant's main brief, this Court found in Lombardozzi that the defendant received "all that he bargained for." This is certainly not the case at bar. Moreover, the Government relies on Lombardozzi for the proposition that the omission of this promise from Appellant's allocution portrays its insignificance and, therefore, non-reliance. Suffice it to say, however, that the broken promise in Santobello was not contained in the record. 404 U.S. at p.260.

II. THE FEOLA CASE

The Appellant has argued in Point III of his brief that there was an insufficient factual basis on which to accept the plea of guilty to the conspiracy charge in the Indictment.

The Government meets this argument with the submission that:

> "The Supreme Court's recent decision in United States v. Feola, 43 U.S.L.W. 4404, March 19, 1975, disposes of this frivolous argument." (Gov't. Br., p.32)

The Government's reliance on Feola is disingenuous. The Government earlier states that:

> "To support a conviction on the conflict of interest charge, it was not necessary that either defendant admit conscious wrongdoing or evil motive." (Gov't. Br., p.31, emphasis supplied)

The Government contends, therefore, that the substantive violation does not require a mens rea.[1/] In Feola, the Supreme Court held:

> "...that where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a mens rea requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense."

The Court specifically "save[d] for another day" the question of whether Judge Hand's traffic light analogy is applicable where a particular substantive statute has no requirement of

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1/ Black's Law Dictionary defines mens rea as a "guilty mind; a guily or wrongful purpose; a criminal intent."

mens rea. In this situation, therefore, United States v. Crimmins, 123 F.2d 271 (2nd Cir., 1941) remains the law of this Circuit.

CONCLUSION

For the reasons stated in this brief and in Appellant's main brief, the Order of the District Court should be reversed.

Respectfully submitted,

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Service of ~~three (3)~~ Two (2) copies of the within is hereby admitted

this day of

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Attorney(s) for

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PAUL J. CURRAN
U. S. ATTORNEY
SO. DIST. OF N.Y.